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The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve

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THE ARDUOUS VIRTUE OF FIDELITY: ORIGINALISM, SCALIA, TRIBE, AND NERVE*

Ronald Dworkin**

I.

NEXT weekend Fordham is host to a conference on constitutional fidelity. It would be hard to think of a more topical issue. Many of you, no doubt, heard Senator Dole's speech accepting the nomination of his party for the presidency, in the course of which he reported, "I have been asked if I have a litmus test for judges. I do. My litmus test for judges is that . . . their passion is not to amend but to interpret the Constitution."¹ Now, we know what Dole meant. He meant he would not appoint the kind of judges who voted in the majority in *Roe v. Wade*.² Or the kind of judges who have kept prayer out of the public schools. He would appoint judges who would let the people do what they wanted, free from the constraint of a moral interpretation of the Constitution. He invited his audience to assume that his vision is what keeping faith with the document means. One of the paradoxes that I'll try to expose this evening is that the people Dole had in mind as the good judges were the ones for whom fidelity to the Constitution actually counts for little. And those whom he would count as the bad judges are, in my view, the true heroes of fidelity. In any case, that's the argument that I'm going to try to make.

I must start with a distinction, however, between fidelity to the Constitution's text and fidelity to past constitutional practice, including past judicial decisions interpreting and applying the Constitution. Proper constitutional interpretation takes both text and past practice as its object: Lawyers and judges faced with a contemporary constitutional issue must try to construct a coherent, principled, and persua-

* I was asked to devote the Levine Lecture to the themes of my recent book, *Freedom's Law: The Moral Reading of the American Constitution*, as an introduction to a conference on constitutional fidelity. My lecture was recorded and transcribed, and what follows is an edited version of the transcript. After the Symposium on Fidelity in Constitutional Theory at Fordham University School of Law, however, Justice Scalia's book, *A Matter of Interpretation: Federal Courts and the Law*, was published, and it provides such an effective case study of many of the claims I made in the lecture that I have inserted a new section III, not derived from the original lecture, to discuss it.

** Professor Dworkin delivered these remarks on September 18, 1996, as part of the Levine Distinguished Lecture Series, an annual lecture series at Fordham University School of Law.

1. Senator Bob Dole, "I Will Restore the Promise of America," Acceptance Speech at 1996 Republican National Convention (Aug. 15, 1996), in *Wash. Post*, Aug. 16, 1996, at A36.

2. 410 U.S. 113 (1973).

sive interpretation of the text of particular clauses, the structure of the Constitution as a whole, and our history under the Constitution—an interpretation that both unifies these distinct sources, so far as this is possible, and directs future adjudication. They must seek, that is, constitutional *integrity*. So fidelity to the Constitution's text does not exhaust constitutional interpretation, and on some occasions overall constitutional integrity might require a result that could not be justified by, and might even contradict, the best interpretation of the constitutional text considered apart from the history of its enforcement. But textual interpretation is nevertheless an essential part of any broader program of constitutional interpretation, because what those who made the Constitution actually said is always at least an important ingredient in any genuinely interpretive constitutional argument.

So I shall concentrate on textual interpretation in these remarks. That seems appropriate, in the context of the coming weekend conference, because constitutional lawyers often think that fidelity to the Constitution means fidelity to its text. That is the kind of fidelity Senator Dole apparently had in mind, for example. It is the kind of fidelity demanded by self-styled constitutional "originalists," like Supreme Court Justice Antonin Scalia, and rejected by critics of originalism like Professor Laurence Tribe. I shall argue that even if we concentrate exclusively on textual fidelity, we reach radically different conclusions from those that Dole, Scalia, and other "originalists" expect.

Indeed, textual fidelity argues so strongly in favor of a broad judicial responsibility to hold legislation to direct moral standards that a great many constitutional scholars, including those who call most loudly for "originalism," actually argue *against* textual fidelity as a constitutional standard. They rely on other standards and values as substitutes for fidelity. They rarely put it that way. But if you listen carefully to this weekend's proceedings, you will find that substitution for fidelity is a hidden subtext. Some scholars will argue that we should try to discover, not what those who wrote or ratified the Constitution and its various amendments meant to say, but what they expected or hoped would be the consequence of their saying what they did, which is a very different matter. Others will argue that we should ignore the text itself in favor of how most people understood its import over most of our history: They argue, for example, that the fact that many states have made homosexual sodomy a crime shows that the Constitution does not prohibit that piece of injustice. If my argument tonight is sound, these are both ways of ignoring the text of the Constitution. Why do distinguished scholars work so strenuously to avoid the Constitution? I'll attempt an answer to that question later by identifying various grounds people might think they have for ignoring constitutional fidelity.

But I should now say that I do not mean to assume, at the outset, that there are no such grounds. It is true that most citizens expect the

Supreme Court to cite the Constitution to justify its constitutional decisions. But different departments of our government make very important and consequential decisions for which no argument of fidelity to any text or tradition is required. We send men and women to war, adopt foreign policies or monetary strategies, and shoot missiles at Mars, and we justify these decisions on the ground that good will come of them in the future—that we will be more secure or more prosperous or more at home in our universe. We shouldn't rule out, at the start, that such forward-looking justifications would be more appropriate in constitutional adjudication than the backward-looking argument of textual fidelity, particularly since no less distinguished a judge than Richard Posner has argued with great passion that they are more appropriate. Nor should we assume that the different kind of backward-looking justification some of the scholars I mentioned endorse, which appeal to history apart from constitutional text, would not be more appropriate. Perhaps it is justifiable, at least in some circumstances, to disregard fidelity.

II.

For now, however, my question is not that one. I must first justify my initial claims about what fidelity to our Constitution's text means. I must be careful to distinguish that question from a different one with which it is often confused: The institutional question of what bodies—courts, legislatures, or the people acting through referenda—should be assigned the final responsibility to decide what fidelity requires in particular cases. It is perfectly possible for a nation whose written constitution limits the power of legislatures to assign the final responsibility of interpreting that constitution to some institution—including the legislature itself—other than a court. My question is prior to the question of institutional design: What is the correct answer to the question of what our Constitution means, no matter what or who is given final interpretive responsibility?

We have a constitutional text. We do not disagree about which inscriptions comprise that text; nobody argues about which series of letters and spaces make it up. But, of course, identifying a canonical series of letters and spaces is only the beginning of interpretation. For there remains the problem of what any particular portion of that series *means*. Hamlet said to his sometime friends, "I know a hawk from a handsaw." The question arises—it arises for somebody playing the role, for example—whether Hamlet was using the word "hawk" that designates a kind of a bird, or the different word that designates a Renaissance tool. Milton spoke, in *Paradise Lost*, of Satan's "gay hordes." Was Milton reporting that Satan's disciples were gaily

dressed or that they were homosexual?³ The Constitution says that a President must be at least "35 years of age." Does that mean chronological age, or does it mean (what would be alarming to several contemporary politicians) emotional age instead?

The Eighth Amendment of the Constitution forbids "cruel" and unusual punishment. Does that mean punishments that the authors thought were cruel or (what probably comes to the same thing) punishments that were judged cruel by the popular opinion of their day? Or does it mean punishments that are in fact—according to the correct standards for deciding such matters—cruel? The Fourteenth Amendment says that no state shall deny any person "equal protection of the laws." Does that mean that no state may deny anyone the equality of treatment that most states have accorded over our history? Or does it mean that no state may perpetuate any distinctions that contradict genuine equal citizenship, whether Americans have understood that contradiction before or not?

We must begin, in my view, by asking what—on the best evidence available—the authors of the text in question intended to say. That is an exercise in what I have called constructive interpretation.⁴ It does not mean peeking inside the skulls of people dead for centuries. It means trying to make the best sense we can of an historical event—someone, or a social group with particular responsibilities, speaking or writing in a particular way on a particular occasion. If we apply that standard to Hamlet, it's plain that we must read his claim as referring not to a bird, which would make the claim an extremely silly one, but to a renaissance tool. Hamlet assured his treacherous companions that he knew the difference between kinds of tools and knew which kind he was dealing with in them. In the case of poor Satan's gay hordes, there's a decisive reason for thinking that Milton meant to describe them as showy, not homosexual, which is that the use of "gay" to mean homosexual postdated Milton by centuries. In my view, we have as easy a job in answering the question of what the people who wrote that a president must be 35 years of age collectively meant to say. It would have been silly of them to have conditioned eligibility for the presidency on a property so inherently vague and controversial as that of emotional age, and there is no evidence of any such intention. We can make sense of their saying what they said only by supposing them to have meant chronological age.

3. I am indebted to McConnell for his correct advice that "gaily dressed" is a much better translation than "jolly," which I used in the lecture he heard. See Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 Fordham L. Rev. 1269, 1279 (1997).

4. See Ronald Dworkin, *Law's Empire* ch. 9 (1986) [hereinafter Dworkin, *Law's Empire*].

When we come to the word "cruel" in the Eighth Amendment, the equal protection language of the Fourteenth, the freedom of speech language of the First, and the due process language of the Fifth and the Fourteenth, however, we have more difficult problems of translation. We have to choose between an abstract, principled, moral reading—the authors meant to prohibit punishments that are in fact cruel as well as unusual or meant to prohibit whatever discriminations are in fact inconsistent with equal citizenship—and a concrete, dated reading—they meant to say that punishments widely thought cruel as well as unusual at the time they spoke, or discriminations then generally understood to reflect unfair distinctions, are prohibited.⁵ If the correct interpretation is the abstract one, then judges attempting to keep faith with the text today must sometimes ask themselves whether punishments the Framers would not themselves have considered cruel—capital punishment, for example—nevertheless are cruel, and whether discriminations the Framers themselves thought consistent with equal citizenship—school segregation, for example—are nevertheless a denial of equal protection of the laws. If the correct interpretation is the dated one, on the other hand, these questions would be out of place, at least as part of an exercise in textual fidelity, because the only questions a dated understanding would pose is the question of what the Framers or their audience thought.

If we are trying to make best sense of the Framers speaking as they did in the context in which they spoke, we should conclude that they intended to lay down abstract not dated commands and prohibitions. The Framers were careful statesmen who knew how to use the language they spoke. We cannot make good sense of their behavior unless we assume that they meant to say what people who use the words they used would normally mean to say—that they used abstract language because they intended to state abstract principles. They are best understood as making a constitution out of abstract moral principles, not coded references to their own opinions (or those of their contemporaries) about the best way to apply those principles.

But that answer to the question of how the apparently abstract rights-bearing constitutional provisions should be understood makes the task of adjudicating contemporary constitutional disputes much more difficult than it would be if the concrete, dated, understanding were the correct one. If the standards that we—citizens, legislators,

5. There is another possibility pointed out to me by Ori Simchen: that we should read the Eighth Amendment's reference to cruelty as subjective but not dated, so that it forbids punishments that are widely regarded as cruel at the time such punishments are imposed. As we shall see, Justice Scalia supposes that anyone who rejects the dated subjective reading must adopt an undated subjective one: that is why he insists that his opponents think that the force of the Constitution depends on popular opinion from time to time. But the plausible alternative to a dated subjective reading is not an undated subjective one, but a principled one: one which translates the Eighth Amendment as referring to punishments that really are cruel.

judges—must try to apply out of fidelity to the text of the abstract provisions are abstract moral standards, the questions we must ask and the judgments we must make must be moral ones. We must ask: What is really cruel? What does equal citizenship really require? What legislation is consistent with due process of *law*, given that legal integrity is of the essence of law's process, and that integrity requires that the liberties our culture recognizes in broad principle—freedom of conscience, for example—must be respected in individual legislative decisions about, for example, freedom of choice in dying?⁶

These are difficult questions. Citizens, lawyers, and judges should not try to answer them on a clean slate, ignoring the answers that others, particularly judges, have given to them in the past. As I said, any strategy of constitutional argument that aims at overall constitutional integrity must search for answers that mesh well enough with our practices and traditions—that find enough foothold in our continuing history as well as in the Constitution's text—so that those answers can plausibly be taken to describe our commitments as a nation. If I were trying to answer the question of what equal citizenship means as a philosophical exercise, for example, I would insist that citizens are not treated as equals by their political community unless that community guarantees them at least a decent minimum standard of housing, nutrition and medical care. But if the Supreme Court were suddenly to adopt that view, and to announce that states have a constitutional duty to provide universal health care, it would have made a legal mistake, because it would be attempting to graft into our constitutional system something that (in my view) doesn't fit at all.

Very often, however, controversial decisions that seem novel do satisfy that test of fit. When the Supreme Court decided, in 1954, that official segregation by race was illegal, despite generations of practice to the contrary, it did not just announce an academic political truth. It called attention to general standards of equality that were firmly fixed in our history though selectively ignored in our practice, standards that condemned arbitrary discriminations serving no legitimate governmental purpose. The Court was able convincingly to argue that the practice of racial segregation was inconsistent with a broader reading of principle. I think the same could be said for Court's abortion decision, *Roe v. Wade*.⁷ In that case, the Court had to ask itself whether the idea that certain basic liberties are in principle immune from government regulation, an idea that is embedded by precedent in the

6. Those who say that "substantive due process" is an oxymoron, because substance and process are opposites, overlook the crucial fact that a demand for coherence of principle, which has evident substantive consequences, is part of what makes a process of decision making a legal process. See my arguments for integrity as a distinctly legal ideal in Dworkin, *Law's Empire*, *supra* note 5, at ch. 6.

7. 410 U.S. 113 (1973).

Fourteenth Amendment, guarantees a more concrete right to an early abortion.

I offer these examples to make plain that though I think that the moral judgment required to apply the abstract moral principles of the Constitution is constricted by history and precedent, in virtue of the commands of legal integrity, it is plainly not preempted by that history. Fresh questions of moral principle—is a right to abortion sufficiently fundamental to fall within the basic liberties that define due process of law?—inevitably remain. Why isn't it, then, more faithful to the Constitution to assign such questions not to contemporary judges but to those who made and ratified that document, at least so far as we can discover or surmise the answers they would give? I have already insisted that we must look to the authors' *semantic* intentions to discover what the clauses of the Constitution mean. Why doesn't it follow that we should also defer to their *political* intentions—their assumptions and expectations as to how the clauses they wrote would be applied? If the authors of the Equal Protection Clause didn't think that racially segregated schools denied equality of citizenship, why doesn't that end the question of what fidelity to that clause requires?

In fact, however, taking that further step is a serious intellectual confusion and constitutional mistake. It is a fallacy to infer, from the fact that the semantic intentions of historical statesmen inevitably fix what the document they made says, that keeping faith with what they said means enforcing the document as they hoped or expected or assumed it would be enforced. Imagine that you are the owner of a large corporation which has a vacancy in one of its departments. You call in your manager and say to her: "Please fill this vacancy with the best candidate available. By the way (you add, without winking or nudging) you should know that my son is a candidate for this position." Assume you are honestly convinced that your son is the best qualified candidate. Assume, moreover, that you wouldn't have given the manager those instructions unless you were sure that it was obvious to everyone, including her, that your son was the best candidate. Assume, finally, that your manager knows all of this: She knows that if the choice were yours you would conscientiously appoint your own son as the most qualified candidate. Nevertheless, you didn't tell her to hire your son. You told her to hire the best candidate. And if, in her judgment, your son is not the best candidate, but someone else is, then she would be obeying your instructions by hiring that other candidate, and disobeying your instructions by hiring the candidate you intended and expected would get the job. You might—I hope you wouldn't—fire her if she obeyed your instructions in that way. But you couldn't deny that she had been faithful to your instructions, and that she would not have been faithful had she deferred to your view about the best candidate instead of her own. An agent is unfaithful to an instruction unless she aims to do what the instruction, properly in-

terpreted, directs. If the instruction sets out an abstract standard, she must decide what meets that standard, which is of course a different question from the question of what some person—any person—thinks meets the standard. Contemporary legislators and judges are subject to the same rigorous demand.

III.

The question of fidelity dominated a conference last year at Princeton, at which Justice Scalia delivered two Tanner Foundation Lectures, four commentators replied to those lectures, and Scalia responded to those replies. The proceedings have now been published (after some participants edited and expanded their original remarks) in a volume called *A Matter of Interpretation*.⁸ The comments of two of the participants—Scalia and Professor Tribe—illustrate both the difficulty and the importance of the distinction that I have just been emphasizing—the distinction between semantic intention (what the Framers meant to say) and political or expectation intention (what they expected would be the consequence of their saying it).

In my own remarks at the Princeton conference, I used that distinction to contrast two forms of what Scalia called “originalism”: “semantic originalism,” which takes what the legislators meant collectively to say as decisive of constitutional meaning, and “expectation originalism,” which makes decisive what they expected to accomplish in saying what they did.⁹ I said that in his first Tanner lecture Scalia had subscribed to the former version of originalism, but that in his second lecture, in his remarks about constitutional interpretation, he had relied on expectation intention instead—as indeed, I said, he has done in his career on the Supreme Court.

In his published reply to my comments, Scalia accepts the distinction, and declares himself a semantic rather than an expectation originalist.¹⁰ He denies the inconsistency I pressed, but in a way that confirms my suspicion that his constitutional practice has abandoned the fidelity he preaches. I had used one of the examples I have used this evening—the interpretation of “cruel” in the Eighth Amendment—to illustrate the difference between semantic and expectation originalism. Scalia argued, in his lecture, that the fact that the Framers of that Amendment contemplated the possibility of capital punishment elsewhere in the Bill of Rights—by declaring, for example, in the Fifth Amendment, that “life” could not be taken without due process of law—was clear proof that they did not intend to prohibit it in

8. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997) [hereinafter *A Matter of Interpretation*].

9. Ronald Dworkin, *Comment, in A Matter of Interpretation, supra* note 8, at 115, 115-27 [hereinafter, Dworkin, *Comment*].

10. Antonin Scalia, *Response, in A Matter of Interpretation, supra* note 8, at 129, 144 [hereinafter Scalia, *Response*].

the Eighth Amendment.¹¹ I said that if Scalia were a true semantic originalist, he would be assuming, in that argument, something that seems very odd:

[T]hat the framers intended to say, by using the words "cruel and unusual," that punishments generally thought cruel at the time they spoke were to be prohibited—that is, that they would have expressed themselves more clearly if they had used the phrase "punishments widely regarded as cruel and unusual at the date of this enactment" in place of the misleading language they actually used.¹²

Scalia replies that his argument about capital punishment presupposes no such thing, and he calls my suggestion that it does a "caricature" of his view. Only a very few lines later, however, he states his own view: that what the Eighth Amendment enacts is "the existing society's assessment of what is cruel. It means . . . what we [that is to say the Framers and their contemporaries] consider cruel today."¹³ He then draws the appropriate conclusion: "On this analysis, it is entirely clear that capital punishment, which was widely in use in 1791, does not violate the abstract moral principle of the Eighth Amendment."¹⁴ Unless these latter passages have a deep meaning I cannot fathom, they endorse exactly the view that Scalia, only a few lines earlier, had rejected as caricature.

So Scalia, confronted with an account of what his constitutional position would presuppose if he were a semantic originalist, rejects that account as preposterous. But when, immediately after, he tries to state a view that is both faithful to the constitution's text and consistent with his own constitutional attitudes, he is forced to state the very view he had just rejected. His theoretical stance is therefore contradictory. It cannot inhibit his constitutional adjudication, which in fact has little to do with keeping faith with the Constitution. Could there be a more dramatic illustration of the difficulty under which constitutional lawyers in Scalia's mode labor? They must profess fidelity but feel bound, in practice, to disown it.

Though Tribe is the most prominent, unabashed, and uncompromising liberal among well-known constitutional practitioners, his own remarks¹⁵ show that he faces a dilemma surprisingly similar to Scalia's, though it will take me longer to identify it. Tribe begins his much expanded published comments by declaring that he disagrees with both Scalia and myself: "I do not agree with either Professor Dworkin

11. Antonin Scalia, *Common-Law in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation*, *supra* note 8, at 3, 46 [hereinafter Scalia, *Common-Law*].

12. Dworkin, *Comment*, *supra* note 9, at 120.

13. Scalia, *Response*, *supra* note 10, at 145.

14. *Id.*

15. Laurence H. Tribe, *Comment*, in *A Matter of Interpretation*, *supra* note 8, at 65, 65-94 [hereinafter Tribe, *Comment*].

or Justice Scalia," he says, "that one can 'discover' . . . empirical facts about what a finite set of actors at particular moments in our past meant to be saying."¹⁶ He criticizes me, in particular, for thinking that constitutional interpretation depends on retrieving such empirical facts, and also for thinking that novel constitutional interpretations "actually represent nothing new at all but . . . are all merely inferences that emerge by a straightforward . . . process of reasoning our way to the right answers to questions of principle that we can be sure the Constitution's authors and/or ratifiers actually put to us ages ago."¹⁷ (I have never held or defended anything like that view.).¹⁸

I take these remarks to mean that Tribe rejects any requirement of fidelity to the Constitution's text when different interpretations of that text are possible. It is true that his remarks can be read in a much more innocuous way, but, if they are, then the disagreement he announces between himself and both Scalia and me would disappear. We can read them, for example, as objecting only to the confidence we seem to show in the particular judgments about semantic intention that we make. He sprinkles epistemic intensifiers over the views he attributes to Scalia and me. He says, for example, that though he himself holds many views about constitutional interpretation, "I do not claim these to be *rigorously demonstrable* conclusions, or confuse them with *universally held* views."¹⁹ He elsewhere describes, as the "Dworkinian reading" of the First Amendment, that it was "*self-evidently* intended to enact a broad moral principle" and he denies that that claim of self-evidence "*is demonstrable* either."²⁰ He spurns what he identifies as Scalia's and my "no doubt sincere (but nevertheless misguided) *certitudes*."²¹

Of course, neither Scalia nor I would accept these reports of our opinions. Constitutional interpretation is not mathematics, and no one but a fool would think his own constitutional judgments beyond any conceivable challenge. We argue for our constitutional interpretations by offering the best and most honest case we can for their superiority to rival interpretations, knowing that others will inevitably reject our arguments and that we cannot appeal to shared principles of

16. *Id.* at 68.

17. *Id.* at 73.

18. Tribe must have been misled by my argumentative strategy. I did not mean, in my brief remarks, to abandon either my long-standing opposition to any form of originalism or the account of statutory and constitutional interpretation that I argued at length in Chapters 9 and 10 of *Law's Empire*, *supra* note 5, to which Tribe generously refers, and which I summarized earlier in this lecture. My argument on this occasion was *ad hominem*: I was responding to Scalia's lectures by pointing out the deep inconsistency that I just described. I argued that *if* one is a semantic originalist, as Scalia says he is, then one must endorse a reading of the Constitution from which he and any other self-described constitutional originalists would recoil.

19. Tribe, *supra* note 15, at 77 (emphasis added).

20. *Id.* at 80 (emphasis added).

21. *Id.* at 72 (emphasis added).

either political morality or constitutional method to demonstrate that we are right.²²

Tribe may feel that even the level of confidence that Scalia and I do show in our interpretive judgments is unjustified, however. He may be misled by his own classification of our opinions as "empirical." That classification might have suggested to him that Scalia and I think that the people who together enacted a particular constitutional amendment shared a particular, identifiable phenomenological state which we have retrieved. But though interpretive claims about a group's semantic intention are properly reported in the language of intention, and though they draw on suppositions about beliefs and attitudes, they are not themselves phenomenological hypotheses. They are, as I have repeatedly said, constructions aimed at making best sense of a collective act of statesmanship that includes speech acts, and though it would be wrong, as I just said, to suppose that only one such construction is possible, or that one is demonstrably the best, it is often not wrong to think that one is, in fact, the best and to have a measure of confidence in the claim.

The pertinent question is therefore not whether we can "demonstrate," or establish "certitudes," or "self-evident" propositions about what the Framers intended to say, or whether we can fish mental states from history and subject them to a merely "empirical" examination. It is whether, in spite of the fact that we cannot do any of that, we must nevertheless decide which view of what the Framers said is, on balance, the better view, even though it is controversial. If Tribe really does disagree with Scalia and me, he must think that we should and need not reach any conclusion about that matter at all, at least in the case of the great abstract clauses, but should conduct constitutional interpretation in some way that does not include such conclusions—through a direct appeal to our own political morality, perhaps, or to what we take to be the dominant political morality of our time.

But though that is a coherent position, and in fact appeals to many academic lawyers, it seems flatly to contradict other claims that Tribe makes with equal fervor. Elsewhere in his comments on Scalia's Tanner Lectures, for example, Tribe endorses a very strong form of textual fidelity. Tribe states:

I nonetheless share with Justice Scalia the belief that the Constitution's written text has *primacy* and must be deemed the ultimate point of departure, that nothing irreconcilable with the text can properly be considered part of the Constitution; and that some parts of the Constitution cannot plausibly be open to significantly different interpretations.²³

22. That is a pervasive theme in both Dworkin, *Law's Empire*, *supra* note 5, and Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996) [hereinafter Dworkin, *Freedom's Law*].

23. Tribe, *Comment*, *supra* note 15, at 77 (emphasis added).

That is a stronger statement of textual fidelity than I would myself endorse, because, as I said, precedent and practice over time can, in principle, supersede even so basic a piece of interpretive data as the Constitution's text when no way of reconciling them all in an overall constructive interpretation can be found. I agree with the Tribe of this statement, however, that the text must have a very important role: We must aim at a set of constitutional principles that we can defend as consistent with the most plausible interpretation we have of what the text itself says, and be very reluctant to settle for anything else.

But a text is not just a series of letters and spaces: It consists of propositions, and we cannot give a text "primacy"—or, indeed, any place at all—without a semantic interpretation, that is, an interpretation that specifies what (if anything) the letters and spaces mean. Until we have interpreted the letters and spaces in that way, we can have no idea what is or is not "irreconcilable" with the text, or whether the text is vague or ambiguous, or whether it can "plausibly be open to significantly different interpretations." So Tribe's remarks about the text's primacy presuppose a semantic strategy. What is it?

The natural strategy is the one I just described: We decide what propositions a text contains by assigning semantic intentions to those who made the text, and we do this by attempting to make the best sense we can of what they did when they did it. But if Tribe really means to disagree with Scalia and me, he rejects that strategy. What are the alternatives? Someone might say that we should interpret an old text like the Constitution not by attempting to understand what those who made it said but by assuming that it means what it has been taken to mean in the past. There are regression problems in that strategy, but we need not explore them because the strategy is not in any case a way of giving the text the independent primacy Tribe intends. On the contrary, it denies that the text has any independent role in contemporary interpretation.

Consider, therefore, this different possibility (perhaps suggested by Tribe's remark about "plausible" alternatives). Someone might say that textual primacy requires only that no constitutional interpretation be deemed acceptable unless the strings of characters and spaces that make up the text could be used, in some circumstance or other, to express the proposition the interpretation deploys. That extremely weak constraint would permit judges to declare a broad "moral" constitutional right of free speech whether or not the Framers intended to lay down an abstract moral principle in the First Amendment, because the string of letters and spaces they used *could* have been used to declare a broad principle. (On a parallel view of the primacy of text in poetry, we could interpret *Paradise Lost* as homophobic, because the letters that make up "gay" are now used to make a word that refers to homosexuals.). But that odd interpretive strategy is arbitrary and unmotivated in legal or political principle. Why should it matter whether

the inscriptions found in the Constitution could or could not be used to state a particular proposition, unless we think that the best interpretative conclusion is that that is the proposition that those inscriptions do state? Would it not be equally sensible to say, instead, that the text must be primary in the anagram sense: that it can be understood as forbidding anything that the letters in it can be *rearranged* to forbid?

So it is extremely difficult to reconcile Tribe's vows of textual fidelity with any interpretive strategy except the natural one. But that is the one he must reject if he really does disagree with Scalia and me. There is more trouble still. In many other passages Tribe plainly assumes that that natural strategy is the correct one, and that it does make sense to suppose that the Framers intended to say one thing rather than another when the words they used might be used to say either. He has added to his own expanded text, for example, the argument I made at the Princeton conference and repeated in this lecture: that Scalia's reliance on other parts of the Bill of Rights as evidence that the Eighth Amendment does not forbid capital punishment is inconsistent with his professed semantic originalism.²⁴ But my charge of inconsistency absolutely depends on a claim about what the Framers meant to say in the Eighth Amendment. If they meant to set out the proposition I said Scalia assumed they did—that punishments unusual and cruel according to the general opinion of the day are forbidden—then Scalia's textual argument would not be inconsistent; on the contrary, it would be persuasive. We can declare it inconsistent only if we can be confident, as Tribe in *this* context certainly appears to be, that the Framers did not mean to set out that dated provision, but an abstract one instead. In adopting the argument, he relies on exactly the kind of judgment that he criticizes Scalia and me for supposing we can make.

Even these passages do not exhaust the mystery. Tribe is a skilled litigator, and he does not lightly set aside arguments in favor of his positions. He says he agrees with me that the First Amendment states a principle of political morality. Why then does he reject the argument that, on the best interpretation, it was intended to express such a principle? Why does he claim a disagreement with Scalia and me that he must struggle to make genuine, that makes much of the rest of what he says incoherent if he succeeds, and that forfeits apparently strong arguments for many of his constitutional convictions? The answer is strongly suggested in the beginning of another passage: He says he wants to prevent constitutional interpretation "from degenerating into the imposition of one's personal preferences or values under the guise of constitutional exegesis."²⁵ Though, as I said, judges

24. *Id.* at 66.

25. *Id.* at 71.

who interpret an abstract moral constitution do not simply put moral issues to their own conscience, that is certainly part of what they must do. Perhaps Tribe wishes he could disavow any reliance on what the Framers meant to enact because he believes, as I do, that on the most persuasive view they meant to enact a Constitution that left faithful judges and lawyers no choice but to do what he worries is illegitimate.

But he has no way out of that conundrum. Notice how he finishes the sentence whose beginning I just quoted:

[O]ne must concede how difficult the task is; avoid all pretense that it can be reduced to a passive process of *discovering* rather than *constructing* an interpretation; and replace such pretense with a forthright account, incomplete and inconclusive though it might be, of why one deems his or her proposed construction of the text to be worthy of acceptance, in light of the Constitution as a whole and the history of its interpretation.²⁶

The end of the sentence, in other words, in no way mitigates the worry of the beginning, but only confirms it. Even judges who look to "the Constitution as a whole and the history of its interpretation," as integrity requires them to do, must nevertheless deploy their own convictions of political morality in arguing why their interpretations are more "worthy of acceptance" than other constructions that would also pass that test, and though "forthright" candor is of course a virtue, it does not alter what one is candid about.

Tribe's difficulties, though parallel to Scalia's, run in the opposite direction. Scalia wants to be seen to embrace fidelity, but he ends by rejecting it. Tribe wants to reject fidelity, but ends by embracing it. Whose ending is the right one? That is the question I postponed and must now take up. Is constitutional fidelity, properly understood, a political virtue or a political vice?

IV.

Even a fidelity to the abstract Constitution that is disciplined by integrity requires judges, lawyers, legislators, and others who interpret the Constitution to make fresh moral judgments about issues, like abortion, assisted suicide, and racial justice, that deeply divide citizens. Any official's opinion on these issues is certain to be not only controversial but hated by many. Perhaps our judges would do better to set fidelity aside. Perhaps they would serve us better if they aimed not to enforce the Constitution we have but to make up a better, or in any case, a different one. Perhaps, if Dole really meant the opposite of what he said, he was right.

But what grounds could we offer for setting fidelity aside? What could trump fidelity? I can think of three virtues that might be thought more important in the constitutional context, and I'll now

26. *Id.* at 71-72.

consider each of them. First, in some circumstances fidelity might be trumped by justice. A political society might find itself saddled with a constitutional settlement that many of its members now deem very unjust, and in some circumstances judges of that community might properly decide simply to ignore that constitution. They might lie by claiming publicly that their decisions were dictated by fidelity, though they knew, and perhaps privately conceded, that the opposite was true. Or they might (if their situation allowed) simply declare that they regarded the old constitution, or at least part of it, as no longer binding on them. Many people now think, for example, that the pre-Civil War judges who were asked to declare the Fugitive Slave Act unconstitutional should have done so in spite of the fact that (in these critics' opinion) fidelity demanded the contrary result. We can easily imagine such a judge telling himself that though the Constitution did not condemn laws requiring citizens to return escaped slaves, such laws were nevertheless too monstrous to be enforced.

I mention justice as a possible trump over the demands of fidelity, however, only to set it aside. For the supposed problem we have identified is not that fidelity requires judges to uphold laws they think immoral. It is close to the opposite: that since the Constitution contains abstract moral principles, fidelity gives judges too much leeway to condemn laws that seem unjust to them though they have been endorsed by a properly elected legislature. A second possible trump over fidelity is much more in point now. It is democracy itself.

As I said earlier, fidelity to a moral constitution does not entail that judges should be the final arbiters of what that constitution requires in concrete controversies. Still, in our political arrangement, federal judges are the final authorities of constitutional law, and many scholars, judges, and citizens believe that is undemocratic for judges to make the kinds of moral judgment that true fidelity would require, because in a genuine democracy the people ought to decide fundamental issues of political morality for themselves. If we care about our democracy, according to this objection, we will turn a blind eye to infidelity, at least in the case of the great abstract clauses of the Constitution, and insist on a more modest role for our courts.

Is that argument sound? Obviously, it all depends on what you mean by democracy. For we can distinguish two concepts of democracy, one of which certainly would justify this complaint, and the other of which would not. The first is majoritarianism. The essence of democracy, according to that view, is that all issues of principle must be decided by majority vote: Democracy, in other words, is majority rule all the way down. If that is what democracy means, then of course a scheme of judicial review that gives judges power to set aside judgments of political morality that a majority approves is anti-democratic. Suppose we define democracy differently, however. Democracy, on this different view, means self-government by all of the people acting

together, as members of a cooperative joint venture, with equal standing. In my view, that is a much more attractive understanding of democracy's nerve than the majoritarian claim. Majority rule is democratic only when certain prior conditions—the democratic conditions of equal membership—are met and sustained.

What conditions are these? I tried to define them, at some length, in my recent book, *Freedom's Law: The Moral Reading of the American Constitution*.²⁷ First, there can be no democracy, conceived as a joint venture in self-government, unless all citizens are given an opportunity to play an equal part in political life, and that means not only an equal franchise, but an equal voice both in formal public deliberations and in informal moral exchanges. That is the right guaranteed in principle by the First Amendment. Second, there can be no democracy so conceived unless people have, as individuals, an equal stake in the government. It must be understood, I mean, that everyone's interests are to be taken into account, in the same way, in determining where the collective interest lies. I believe that requirement underlies the Equal Protection Clause, properly understood. Third, there can be no democratic joint venture unless individuals are granted a private sphere within which they are free to make the most religious and ethical decisions for themselves, answerable to their own conscience and judgment, not those of a majority. No one can regard himself as a full and equal member of an organized venture that claims authority to decide for him what he thinks self-respect requires him to decide for himself. That is the basis of the First Amendment's guarantee of religious freedom, and also the due process clause guarantee—so far only imperfectly realized—of independence in the fundamental ethical choices that define each individual's sense of why his or her life is valuable and what success in living it would mean.

According to the alternative view of democracy—you might call it constitutional democracy—majority rule isn't even legitimate, let alone democratic, unless these conditions are at least substantially met. So if you adopt that view of democracy, the argument that judicial review is in its nature inconsistent with democracy fails. I do not mean, as I have already twice said, that constitutional democracy positively demands a structure like ours, a structure that records the democratic conditions in a written, foundational document and assigns final interpretive authority over whether those conditions have been met to courts. You might well think that it would have been better to have given that responsibility to some special elected body, that the decision we either made or ratified in the nineteenth century, to give un-elected judges that interpretive responsibility, was unwise. But that's a different matter. You can't say that the majority has an automatic, default, title to make those interpretive decisions without beg-

27. See Dworkin, *Freedom's Law*, *supra* note 23.

ging the question, because, of course, the majority has no title to govern unless the conditions are satisfied. It begs the question to think that the concept of democracy can dictate which institutions should or should not be given final interpretive authority. That decision, as I argue in *Freedom's Law*, must be made on other grounds.

We have now considered two putative trumps over fidelity. We set aside the first—that a constitution might be so unjust that it forfeits fidelity—as not germane to the present argument. We studied the second—that under our structure of government, which assigns final interpretive authority to judges, fidelity to the abstract moral clauses of the Constitution gives undemocratic power to those officials. Now I want to discuss, though necessarily briefly, a third ground for trumping fidelity which we might call legal pragmatism.²⁸ Pragmatism has exerted some influence on American legal theory for many decades, and is now enjoying something of a renaissance, particularly in constitutional theory.

Legal pragmatism—or at least one prominent strain of it—argues that judicial decisions should be small, careful, experimental ones. It makes that claim not out of a concern for democracy, but rather out of a conviction that lawyers and judges will do better for society by trying to discover what really works in practice rather than by attempting to deduce concrete decisions from large, broad, abstract statements of principle of the kind that fidelity to the Constitution's text would require. Judges, pragmatists claim, should concentrate on the actual and limited circumstances of particular cases, trying only to find accommodations of issues and interests that are successful in that limited frame. Above all, judges should be wary of deciding more than they have to decide at any one time. It is better that the law, including constitutional law, grows slowly, incrementally, by analogy rather than grand principle, testing its steps one by one, attempting bit by bit to make the law work better. Fidelity to our abstract Constitution commands the opposite. It commands judges to construct large-scale interpretations of grand moral principles. It points us, on this view, in exactly the wrong direction.

Legal pragmatism sounds wonderfully wise, doesn't it? It sounds very American, empiricist, hard headed, even—particularly when you take account of the main protagonists of the view—very *Chicago*. Broad-shouldered hog butcher to the world, and all of that. But its voice is also, with appropriate change of diction and nuance, the voice of Oliver Wendell Holmes, the patron saint of the approach, who said, as you all know, that the “life of the law”²⁹ is not logic but experience. It is the voice of the American legal realists, as they came to be called,

28. I have chosen this name, on this occasion, just for convenience. I do not mean to endorse any suggestion about the connections between legal pragmatism and pragmatism as a more general movement or school in philosophy.

29. Oliver W. Holmes, *The Common Law* 1 (1881).

who transformed American legal education beginning in the 1930s, by insisting that academic law should become more practical, more fact-drenched, less theoretical and abstract.

Up to a point, that pragmatist voice offers sound (if unsurprising) advice. It reminds us that it is well to be as informed as possible, and to have an eye to consequences, when doing or deciding anything. But does it really provide an argument for trumping constitutional fidelity and ignoring the great questions of abstract political principle that constitutional adjudication in the spirit of fidelity requires?

We must distinguish two situations in which a political community might find itself. In the first, it has a pretty good idea of what goals it wants to pursue through its constitutional and other laws—a good sense, we might say, of where it wants to end up. It wants to keep inflation down and nevertheless have sustained growth, for example. It wants a lively political discourse, a lower crime rate, and less racial tension. It would know when it has achieved these goals, but it is now uncertain how to pursue them. It might indeed be helpful, in some such cases, to tell such a community not to try to solve its problems by first constructing grand economic or moral principles and then proceeding in their light, but, instead, to be experimental—to try one thing after another, just to see what works.

In the second situation, however, the community's problem is not that it doesn't know which means are best calculated to reach identified ends. Rather, it doesn't know what goals it *should* pursue, what principles it *should* respect. It wants to be a fair society, a just society, but it doesn't know whether that means increased liberty for people to make intimate sexual decisions for themselves, for example, or whether it means giving preferences in hiring and education to minorities. Its difficulty is not that it doesn't have the factual basis to be able to predict the consequences of granting increased sexual liberty or of adopting affirmative action programs. Or, at least, that is not its only problem. Its deeper problem lies in not knowing whether these consequences would be, overall, improvements or further defects in the justice and fairness of its structures. In these circumstances it's evident, isn't it, that the pragmatist's earnest advice—his practical, empirical, counsel of caution and theoretical abstinence—is worthless.

When we are in the second situation, we can't avoid general principles by asking ourselves whether any particular step "works." We can't do that because no one can have any opinion about what working *is* until he has endorsed, however tentatively, a general principle that identifies a step as a step forward rather than a step backward. Whether increased sexual liberty or affirmative action makes a society more just cannot be decided without deciding what denials of liberty or distinctions of treatment are unjust and why.

We can, it is true, offer ourselves a substitute test. We can say that a social or legal program is working if it reduces social tension, if it

seems to help us to live together with less apparent strain. But that strategy assumes that a reduction in tension is a sign of an improvement in social justice, and the opposite may be true. Perhaps, if we keep a tighter lid on the social and professional aspirations of minorities, as we did for many decades, there will be no fire this time or next time. It might be said that when Jim Crow no longer worked, after the Second World War, the nation abandoned it in the spirit of pragmatism. But those long decades of acquiescence were decades of injustice, and we can't explain why without constructing an account of equal citizenship that must, in the nature of the case, be a general principle of constitutional dimension.

Nor would it help to suggest that constitutional cases should be decided by analogy rather than principle because (paraphrasing Kant) analogies without principles are blind. Which analogy should the Supreme Court have adopted when asked whether women have a right to an early abortion? An abortion is in some ways like infanticide, in others like an appendectomy, and in others like the destruction of a work of art. Which, if any, of these comparisons is in fact appropriate depends on a vast network of argument: There is nothing there just to "see." We can use analogies in stating conclusions reached through principles, but not as different routes to those conclusions.

What about that old staple of conventional legal wisdom—that judges should never attempt to develop a constitutional principle further than what is required by the case at hand? That they should not "reach out" to decide issues of principle not immediately before them? If we read the Constitution as I've been recommending, as a charter of principle, and if we insist that the responsibility of judges is to name these principles and define their measure and scope, must we advise them to dishonor that old counsel?

Not necessarily. For judges acquit their duty to keep faith with the Constitution by reaching the result in the case before them that, in their considered opinion, follows from the best interpretation of an abstract principle of constitutional morality. Fidelity does not in itself require them to state the principle more broadly than is necessary for that limited purpose. But we should notice that stating a principle broadly enough to show why it *does* apply to the question at hand will often mean stating it broadly enough to justify conclusions about other cases, and at least sometimes there is no evident gain and some evident costs in judges refusing to call attention to that fact. Consider, for example, *Romer v. Evans*,³⁰ the recent case in which the Supreme Court declared unconstitutional Colorado's state constitutional provision disabling its cities and subdivisions from granting homosexuals civil rights against discrimination.

30. 116 S. Ct. 1620 (1996).

The decision for the Court didn't even mention *Bowers v. Hardwick*,³¹ its own shameful decision of a decade earlier, in which it declared constitutional Georgia's law making homosexual sodomy between consenting adults a crime. Many people applauded the Court's reticence in refusing expressly to overrule the earlier decision, in spite of the fact that the principle it relied on in *Romer* was patently inconsistent with the earlier decision.³² They said that the issue in the Georgia case was technically independent, even though the same principle would cover both.

Perhaps there is something to be said for the Court's waiting until another case to do what I hope it will do soon. But when constitutional rights are in play, there is a standing and great risk to be set against any reasons there may be for courts postponing recognizing the full implications of their decisions of principle. That is the risk of injustice to a great many people until the day of ripeness is reached. Constitutional timing affects not only doctrine but how people live and die. Whether homosexuals will continue to live yet another, irretrievable, segment of their lives—for some, all the rest of their lives—as second-class citizens depends not just on whether the Court overrules *Bowers*, but when. Lives don't pause while the passive, pragmatic virtues drape themselves in epigrams and preen in law journal articles.

Our great experiment as a nation, our country's most fundamental contribution to political morality, is a great idea triangulated by the following propositions. First, democracy is not simple majority rule, but a joint venture in self government. Second, that joint venture is structured and made possible by a moral constitution guaranteeing to individuals one by one the prerequisites of full membership. Third, we are committed by our history to an institutional strategy of asking judges—men and women trained in the law—to enforce those guarantees of equal citizenship. Of course there are many risks in that great political adventure, as they are in any great political ambition. We have been envied for our adventure, however, in spite of its risks, and we are now increasingly copied from Strasbourg to Capetown, from Budapest to Delhi. Let's not lose our nerve, when all around the world other people, following our example, are gaining theirs. Thank you very much.

31. 478 U.S. 186 (1986).

32. See my article, *Sex, Death, and the Courts*, N.Y. Rev. Books, Aug. 8, 1996, at 44.